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DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 20, 2004

Case No.: TIA-0145

XXXXXXXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of her deceased father, XXXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

## **I. Background**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3).

The DOE program is specifically limited to DOE contractor employees<sup>1</sup> who worked at DOE facilities.<sup>2</sup> The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.<sup>3</sup>

Pursuant to an Executive Order,<sup>4</sup> the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

## **II. The Appeal**

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physician Panel Process. The Physician Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physician Panel because the office determined that the applicant's deceased father did not meet the eligibility requirements for the Physician Panel Process. *See* March 29, 2004 letter from DOE Worker Advocacy Office to the applicant.

In the claim that she submitted to the Office of Worker Advocacy, the applicant stated that her deceased father worked as a blaster and driller in the Homestead Mine #24 in Grant, New Mexico from 1959 to 1961. She further alleged that her deceased father's exposure to radiation during his work in the mine caused his silicosis and other medical conditions. In her appeal, the applicant states her belief that the Homestead Mine where her father worked was an attachment to the Ore Buying Station in Grants, New Mexico, a

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<sup>1</sup> A DOE contractor employee is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

<sup>2</sup> A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

<sup>3</sup> *See* [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

<sup>4</sup> *See* Executive Order No. 13,179 (December 7, 2000).

site listed on DOE's facilities list as a "DOE facility." The applicant further advises that she and her siblings have already received compensation as survivors under the program administered by the Department of Labor, a fact which she believes establishes the validity of her claim before the DOE.

### **III. Analysis**

#### **A. Worker Programs**

It is important to emphasize that the DOE Physician Panel Process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the Physician Panel Process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

Similarly, we emphasize that the DOE Physician Panel Process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel Process.

#### **B. Whether the Applicant is Eligible for the DOE Physician Panel Process**

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee, *i.e.*, an individual who is or was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question worked at a DOE facility, we first consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. The Homestead Mine is not listed on the facilities list. While the Ore Buying Station in Grants, New Mexico is on the list, there are no documents that we could find to support the applicant's supposition that the Homestead Mine #24 was an attachment to the Ore Buying Station in question. Moreover, the Homestead Mine can not be characterized as a DOE facility because the mine was privately operated. *See* Memorandum dated May 1, 2003 from the Office of Worker Advocacy to the Office of Hearings and Appeals. One of the regulatory requirements for designation as a "DOE facility" under the subject regulations is that the DOE have a "propriety interest" in a site. The DOE did not have a "propriety interest" in the Homestead Mine. *Id.* The second regulatory requirement for designation as a "DOE facility" is that the DOE have a contract for the "management and operation, management and integration, environmental remediation services, construction or maintenance" of the site. *See* 42 U.S.C. 73841 (12), 10 C.F.R. § 852.2. The DOE never had any such contracts with regard to the Homestead Mine.

Now, we will consider the applicant's view that she should be allowed to use the DOE Physician Panel because she received a monetary award from the DOL for her deceased father's illnesses. The eligibility criteria for those seeking compensation from DOL under the EEOICPA differ from the eligibility criteria for those seeking assistance from the DOE in filing worker's compensation claims under Subpart D of the EEOICPA.

Therefore, the fact that the applicant received monetary compensation from the DOL under the EEOICPA is not relevant to the eligibility determinations that DOE must make under Subpart D of the EEOICPA. The pivotal question on appeal in this case is whether the applicant's deceased father was a DOE contractor employee. As discussed above, we have concluded that the applicant's deceased father (1) did not work at a DOE facility and (2) was not employed by a "DOE contractor" as that term is defined in the statute and regulations.

For all the reasons set forth above, we find that the Office of Worker Advocacy correctly decided not to present the applicant's claim to the DOE Physician Panel.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0145 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: October 7, 2004